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Supreme Court, U.S.
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In The Supreme Court of the United States

KATHLEEN ALLISON, Warden,

Petitioner,

v.

STEVEN DIAZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE DISTRICT ATTORNEY OF SACRAMENTO COUNTY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether it is proper to order reversal of a criminal case for inadequate assistance of counsel based on the failure to conduct reasonable investigation when the specific matter which was not investigated is a physical item which no longer exists, and therefore cannot be investigated or examined in preparation for a new trial.

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STATEMENT OF INTEREST[1]

The Sacramento County District Attorney has a significant interest in this case. Sacramento County is a jurisdiction of 1.4 million people, and the District Attorney is the chief criminal prosecutor for the jurisdiction, filing on average approximately 30,000 criminal cases per year.

This case presents issues common to all District Attorneys and prosecutors concerning not only the proper and adequate representation of persons being prosecuted, but how the District Attorney can address that issue, and the manner in which the District Attorney must process cases when there has been a reversal. Ensuring both adequate representation of persons being prosecuted, and that appropriate steps are taken to provide defense counsel with all appropriate options before and after conviction, are central to the District Attorney's mission of providing justice for both victims and defendants.

The Sacramento County District Attorney as amicus curiae submits this brief in support of the

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[1] Pursuant to Supreme Court Rule 37.2, amicus gave counsel of record for each party written notice of the intention of amicus to file this brief at least 10 days in advance. All parties consented in writing to the filing of this brief. Under Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for any party, and no person other than amicus curiae made any monetary contribution to the preparation or submission of this brief.

petition for a writ of certiorari to the Ninth Circuit Court of Appeals.

ARGUMENT

Amicus curiae agrees with the matters set out in the petition filed by the California Attorney General on behalf of petitioner here. Amicus writes separately to present additional reasons why this Court should grant a writ of certiorari in this matter. The opinion of the Ninth Circuit Court of Appeals in this case is contrary to the clear opinion of this Court. In addition, the circumstances of this case present an opportunity for this Court to clarify both the analysis to be used in deciding whether criminal defense counsel has made constitutionally permissible tactical decisions in preparation; and what remedy should be applied following habeas reversal for inadequate investigation by defense counsel.

The case arises out of a prosecution for rape. The victim made a prompt report, was examined, and a rape evidence kit was collected. Defendant was arrested shortly after the offense, and admitted having contact with the victim (he claimed she was a prostitute); the defense was not mistaken identity. Before trial, neither party sought to have the rape evidence kit tested for DNA.

I. REVERSAL BY THE NINTH CIRCUIT DUE TO FAILURE OF DEFENSE COUNSEL TO EXAMINE PHYSICAL EVIDENCE WAS NOT WARRANTED WHEN THE PHYSICAL EVIDENCE NO LONGER EXISTS

By a 2-1 vote, the opinion of the Ninth Circuit panel expressly held that respondent's "trial counsel's performance was deficient because his failure to test the DNA evidence constitutes a failure to carry out reasonable investigations. . . ." Slip opinion, p. 4. The Court further went on to conclude that in denying respondent relief, the California Supreme Court made an unreasonable application of United States Supreme Court law. Slip opinion, p. 6. The specific Supreme Court precedents cited by the Ninth Circuit were *Strickland v. Washington*, 466 U.S. 668 (1984), and *Wiggins v. Smith* 539 U.S. 510 (2003).

The analysis by the Ninth Circuit panel failed to take into consideration matters before the state courts that are pertinent to analysis here.

In seeking post-conviction relief in the state court, respondent presented the July 31, 2003 report of attorney Robert Blasier to the Sacramento Superior Court. See Appellant Steven Diaz's (respondent here) Excerpts of Record in the Ninth Circuit (hereafter ER), 55-62. Mr. Blasier reported that the biological evidence in question had been destroyed, and was no longer available for testing. Id., at ER 59-60; see also the Findings and Recommendations of Magistrate Judge Kellison in the District Court, ER 6, lines 5-7.

The destruction plainly took place after trial, when the prosecution and defense had both declined to seek DNA testing.[2]

It necessarily follows that the specific failing attributed to respondent's trial counsel – failure to conduct DNA testing before deciding on trial strategy – cannot be remedied by remand for a new trial. There is no longer any sample to test for DNA (which may or may not have been present in any sample).

Given this circumstance, amicus submits the next step in the analysis must be made under *Arizona v. Youngblood*, 488 U.S. 51 (1988). In that case, defendant was charged with the kidnap and sodomy of a 10-year-old child. The perpetrator released the child, who made a prompt report of the crime, and was examined at a hospital. A sex assault kit and the child's clothing were taken as evidence. Examination of the items revealed the presence of semen. The defense

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[2] The crime occurred February 10, 1996. The biological evidence was at the District Attorney's Crime Lab for a time, but was returned to the Sheriff's Department February 5, 1997. It was then destroyed at some unspecified time in 1997. After trial, defendant was sentenced February 13, 1997, an event that ordinarily occurs 20 judicial days (i.e. four weeks) or more after conviction, after preparation of a presentence report prepared by the probation department. See ER 56, 58-60; California Penal Code § 1191; California Rule of Court 4.411. The conclusion is that defendant was found guilty on or before January 17, and the evidence was at the crime lab for more than two weeks thereafter, before it was returned to the Sheriff's Department, where it was later destroyed.

was mistaken identity. The biological samples and clothing were not refrigerated after the initial examination, and as a result, biological testing (in the pre-DNA era) which might have excluded the defendant as the source of the semen could not later be performed. The defendant contended that the failure to properly preserve the evidence denied him due process. This Court disagreed, holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." 488 U.S. at 58.

Given the above points, the decision of the Ninth Circuit is clearly contrary to the decision of this Court in *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770 (January 19, 2011). *Harrington* gave definition to the application of the federal habeas statute, 28 U.S.C. § 2254, under which respondent here sought relief.

In the instant case, the California Supreme Court denied respondent habeas relief without explanation or comment. ER 3, lines 20-21. In a situation where (as here) a state supreme court has denied habeas relief without explanation, *Harrington* stated:

> . . . a [federal] habeas court must determine what arguments or theories supported, or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this [U. S. Supreme] Court. . . . As a condition for

> obtaining habeas corpus relief from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.
>
> 131 S.Ct. at 786-787.

In the circumstances in the case at bar, that burden cannot be met. The California Supreme Court could readily have decided that, regardless of any conclusion one might reach with the benefit of hindsight as to trial counsel's decision to forego DNA testing, it is impossible for any defense counsel on reversal and remand to now decide trial strategy based on DNA testing. The testing cannot be done.

Since any new trial would be done without the benefit of DNA testing, the question then becomes whether the denial of DNA testing, by virtue of the failure to preserve the evidence, denies respondent due process. *Youngblood* answers that question in the negative. The California Supreme Court could reasonably have concluded that a defendant is not entitled to a new trial so his defense counsel can have the benefit of deciding trial strategy based on the testing of physical evidence that no longer exists. Certainly, no established precedent from this Court holds to the contrary. Neither *Strickland*, supra, nor *Wiggins*, supra, relied on by the Ninth Circuit, relate to the investigation of physical evidence, much less to the

examination of physical evidence that no longer exists.

Taking the analysis a step further, the instant case presents an opportunity for this Court to decide the substantive point of whether reversal is appropriate when the perceived inadequate performance of defense counsel in failing to investigate before trial cannot be remedied on remand, because the circumstances (i.e. post-trial destruction of physical evidence without bad faith) no longer permit the proposed investigation to occur. Amicus submits that in such a circumstance, the rule of *Youngblood*, supra, should govern – reversal is not warranted unless the defendant can demonstrate more than speculation as to a favorable test result, and bad faith destruction of evidence on the part of the government. A contrary result in a case such as the one at bar would mean that the defendant is granted a reversal only to get the same trial he got the first time – a trial without the benefit of DNA testing results.

II. THE NINTH CIRCUIT FAILED TO GIVE DUE DEFERENCE TO THE TACTICAL CHOICE MADE BY DEFENSE COUNSEL NOT TO CONDUCT DNA TESTING WHEN IDENTITY WAS NOT AN ISSUE IN THE CASE

This case also presents an opportunity for this Court to further define the standard for habeas review of the performance of defense counsel as a matter of constitutionally adequate assistance of

counsel. Extending the analysis in *Harrington*, supra, to circumstances involving the choice by defense counsel whether to conduct DNA testing, competent defense counsel could elect not to pursue DNA testing in this circumstance. Identity was not an issue. Had the defense pursued DNA testing, it might have prompted the prosecution to pursue its own DNA testing, with a serious risk that the results would undermine the defense case. See *Harrington*, supra, 131 S.Ct. at 789-790. Under this circumstance, the tactical choice of defense counsel should be given deference in reviewing the constitutional adequacy of his performance.

CONCLUSION

Based on the foregoing, as well as the reasons put forth in the petition for certiorari, amicus curiae respectfully requests that this Court grant certiorari, and reverse the decision of the Ninth Circuit Court of Appeals.

DATED: May 13, 2011

Respectfully submitted,

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